

APPENDIX A
FEDERAL MARITIME COMMISSION

No. 873

**INVESTIGATION OF PASSENGER STEAMSHIP
CONFERENCES REGARDING TRAVEL AGENTS**

DECIDED JANUARY 30, 1964

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman*; THOS. E. STAKEM, *Vice Chairman*; ASHTON C. BARRETT, *Commissioner*):

This proceeding is a general investigation of the agreements and practices of two interrelated passenger steamship conferences as those practices relate to travel agents. It is the first general investigation to be held by the Commission or its predecessors in this area, and all of the passenger lines engaged in the transatlantic trade and their travel agents are directly involved.

This proceeding was instituted as a result of a petition filed by the American Society of Travel Agents (ASTA). The purpose of the investigation is to determine whether Agreement 120, the organic

of final action taken is filed with the Commission. Neither the agenda of the meeting, a report of the discussion of the members, nor any reference to proposals discussed but not adopted is filed with the Commission. In general there appears to be a deliberate conference policy to avoid government review of conference action. One of the lines referred in its correspondence to the conference to "an understanding not to have too much official correspondence," and several references are made in the transcript of hearings to the statements by leading representatives of conference carriers that no minutes could be taken or published because of the existence of the U.S. anti-trust laws.

B. THE TRAVEL AGENTS

There are about 4,000 travel agents in the United States who represent the carriers of the two conferences. Approximately one-third of these are members of ASTA. There are some 575 agencies in New York alone. In 1960, the 4,000-or-so travel agents were responsible for 80 percent of all trans-atlantic steamship passenger bookings made in the United States, exclusive of tours. The conferences and their member lines acknowledge that the travel agents constitute their principal sales force.

The conference action relative to the appointment and control of travel agents is confined, with the exception of agencies located in department stores and automobile clubs, which require conference approval for appointment, to six so-called "Metropolitan Eligible List Territories." The Metropolitan List Territories are those including and immediately surrounding New York, Boston, Philadelphia, Chicago, Los Angeles, and San Francisco.

The agencies located in these Metropolitan List Territories are generally small in size, about 70 per-

cent having five or fewer employees and half having yearly net earnings under \$5,000. There are basically two types of agents—"wholesale" agents, who arrange, sponsor, and conduct package tours, and "retail" agents, who sell the packaged product. In addition to the 7-percent commission the retail agent receives from the TAPC, for the ocean passage, he is paid an additional 3-percent commission by the wholesaler on those items in the package other than steamship fare. Under a somewhat similar arrangement of the International Air Transportation Association, an association of airlines in foreign commerce, the airlines pay a 10-percent commission on the air transport segment of tours. The wholesaler does not receive any net remuneration from the shipline or airline in these circumstances. His revenue comes from commissions on the hotel and insurance facets of the tours. A large majority of agents in Metropolitan List Territories handle retail business exclusively. The agents who act as "wholesalers" may also act as "retailers." The great majority engage exclusively in the travel business and practically all agents represent airlines as well as steamship lines.

C. SPECIFIC PRACTICES OF TAPC AFFECTING TRAVEL AGENTS

1. *Appointment*

Under the TAPC agreement the Control Committee is responsible for the screening of agents in the Metropolitan List Territories, and exercises final authority over all matters relating to the screening of agents including determination as to the placement of an applicant on the "Eligible List." Under the terms of the conference agreement, the member lines may appoint agents only from those appearing on the Eligible List for the particular metropolitan territory. The Control Committee has eight members who each serve for a

term of 2 years. Two members are chosen to represent the lines whose vessels are registered in countries in each of the following areas:

The North Atlantic Group which includes Great Britain, the Scandinavian countries, and Canada;

The Mediterranean Group which includes countries bordering on the Mediterranean, Adriatic, and Black Seas (including Mediterranean France);

The U.S. Group which includes only the United States;

The Continental Group which includes any country on the Continent of Europe not classified above.

The members in each group are selected by the unanimous vote of the lines within the group. The committee meets informally about every 6 weeks. Votes are not ordinarily taken, and if a vote is taken it is not recorded. No minutes of meetings are kept. All actions of the committee must have the unanimous approval of the members.

In the Metropolitan List Territories other than New York, local subcommittees of the Control Committee preliminarily determine the qualifications of applicants and forward their recommendations for agency appointments to the Control Committee. Normally the Control Committee accepts these recommendations. The procedures of the several local committees are not uniform, even as to the Unanimity Rule, which under the conference rules they are all supposed to follow. However, votes are taken and these are forwarded to the Control Committee. If a local committee refuses to recommend an applicant, the application itself is not forwarded to the Control Committee. Thus, in practical effect each local subcommittee exer-

cises considerable power over an applicant in the Metropolitan List Territory under its jurisdiction.

a. The Sponsorship Rule

An applicant for appointment as a travel agent usually communicates with the secretary of the conference, who, in turn, sends the information relative to the applicant to all the member lines. The secretary places the name of the applicant on the agenda of the Control Committee only if one or more of the member lines show an interest in the particular applicant. If no member line shows any interest in the applicant, action on his application is "deferred," and the applicant, of course, may not be appointed an agent by any of the member lines. This requirement of a show of interest by a member line is referred to as the "sponsorship" practice (Sponsorship Rule). Although lines individually often interview prospective agents by the use of questionnaires or of "travelers," who are representatives of the various member lines and who personally visit applicants at their places of business, the conference as a body has no organized system for the uniform gathering of information concerning each applicant. It is left to the "sponsoring" line to bring forward such favorable information as the line deems necessary to secure favorable action on the applicant. The conference has never officially informed applicants of the Sponsorship Rule, some applicants learning of it through the lines, others through ASTA.

Once "sponsored," the applicant is then given consideration by the Control Committee. If the applicant is not voted favorably upon by the Control Committee, he is transferred to a "Preferred List," and his application is considered at subsequent meetings. No application is denied outright, but applicants must often spend several years on the Preferred List before securing the unanimous vote of the Control Commit-

tee necessary for placement on the Eligible List. Although the Control Committee supposedly determines whether or not to place applicants upon the Eligible List by the consideration of such factors as potential ability to produce business, financial stability, business character, location of business, and national origin of the applicant in relation to national origin of the members of the community in which the applicant's business is located, these factors are not spelled out in the conference agreement, rules, or elsewhere. Applicants are not officially informed by the conference as to the standards upon which they will be judged; however, in some instances they may obtain some idea of the standards employed by the members of the Control Committee from conversations with representatives of the lines or from the information requested on the questionnaires that some of the lines provide to some applicants. The Commission has never been informed of these standards. The record shows that the standards have not been applied uniformly, and agents often have had to wait long periods of time before learning of the standards.

Although anyone can book passage on common carriers, including agents not on the Eligible List, the lines are prohibited from appointing agents who have not been approved unanimously for the Eligible List by the Control Committee and commissions for bookings made may not be paid by the member lines to anyone but appointed agents. While under the terms of the conference agreement commissions may be paid retroactively from appointment for 1 year's bookings, retroactive payment is not mandatory and is left to the discretion of the individual line. Unappointed agents find it difficult to make bookings as, lacking prestige, they are not always able to obtain vessel space, nor do they have ready ticket supplies. The

record indicates that these factors coupled with uncertainty of commissions tend to cause unappointed agents where possible to divert passengers from steamship travel to air travel.

b. The Quota System

The TAPC agreement provides that the number of agencies shall be limited, with due regard being given to the requirements of the traffic in various localities. The agreement places the responsibility for the establishment of these limitations with the Control Committee, and it has established quotas limiting the number of agents that can be placed upon the Eligible List for each Metropolitan List Territory. The effect of this provision is to prevent sponsored and otherwise eligible agents from being placed on the lists. Although agents are merely "deferred" to the so-called Preferred List rather than denied placement on the Eligible List, the deferral for extended periods is tantamount to a denial.

c. The Unanimity Rule

The requirement of a unanimous vote by the Control Committee has on many occasions prevented the placement of applicants on the "Eligible List." The record shows that as late as 1959, the local subcommittee for Philadelphia declined to recommend an appointment because of a single "nay" vote, despite eight votes cast in favor of the applicant. Similarly, the Los Angeles local subcommittee in 1951 declined four applications, of which three were approved by majorities of eight to two, and one was approved by a majority of nine to one. These actions caused the retiring chairman of the Los Angeles local subcommittee to record in the minutes of that committee:

the one or two negative votes, resulting in the pending applications being declined under the * * * "unanimous agreement" clause, is ex-

tremely detrimental to the best interests of the majority lines. Further that such negative votes may be cast "on direct instructions" from principals or are actually mischievous rather than cooperative in intent. It is also obvious that the committee's negative action in these cases is being used to advantage to the fullest possible extent by the Trans-Atlantic Air services.

Although all final decisional authority for placement on the Eligible List rests with the Control Committee, and the local committees can merely recommend, it should be borne in mind, as noted above, that when local subcommittees reject applicants, the applications ordinarily do not even come to the attention of the Control Committee.

d. Other TAPC Selection Practices

Conference rules forbid the appointment of agents who are also freight forwarders, or whose places of business are in department stores and automobile clubs. In the Metropolitan List Territory of New York, appointment is prohibited to agencies located in the district south of Fulton Street in Manhattan (Fulton Street Rule). The record shows that these rules have not been uniformly applied. The rules regarding freight forwarders (Freight Forwarder Rule) and agencies located in department stores (Department Store Rule) are grounded on the contention that the agent's concentration on steamship bookings would be lessened by the agent's other activities. Under its authority to waive the rule, the Control Committee has approved about 100 agencies in department stores and 75 in automobile clubs. Also, the Fulton Street Rule may be waived in exceptional cases. There has been no uniformity of standard, however, in handling any of these supposedly exceptional cases.

2. *Control of Agencies After Appointment*

a. The Tying Rule

Conference rules prohibit appointed agents from selling transportation on nonconference lines. All passenger lines operating in the transatlantic trade are members of TAPC. TAPC members carry 99 percent of the passengers moving by water in this trade. The only lines affected by the rule prohibiting sale of tickets via nonconference lines are those freighter services which carry a limited number of passengers on their cargo vessels. Such carriers, like the TAPC lines, must rely on travel agents for the sale of ocean transportation. A main economic threat to the conference lines is that of the air carriers, but the Tying Rule does not prohibit the agents from booking transatlantic travel via air carriers.

b. Sale or Transfer of Agency or Change in Officers or in Address or Name

The official conference rules require only that approval of the appointing lines be obtained prior to the transfer, sale, or change of name or address of an agency. However, in practice, the Control Committee has exercised authority over these transactions. Again precise standards have not been adopted, and the vague standards which have been utilized have not been uniformly applied. At one time, at least, it seems to have been a matter of conference policy to deny sale or transfer without going through termination and reappointment, but this is uncertain. The record contains several examples of cases in which a majority of lines were unable to permit a sale or change in personnel either because of the vague standards or the existence of the Unanimity Rule. Under the Unanimity Rule it is possible for a member of the Control Committee representing a line which has

not appointed the agency in question to block a sale or transfer.

c. Fines and Penalties

Fines and penalties, called "liquidated damages" by the conference, are levied for breaches of conference rules by a Special Committee, the membership of which is the same as that of the Control Committee. No formal procedure has been adopted for determination of the truth of alleged violations. While it appears that the accused agent is afforded the right to tell his side of the story, usually in writing, it does not appear from the record that the agent is afforded any kind of hearing, or any reconsideration of or appeal from the decision of the Control Committee. During the period from 1952 through 1960, the Special Committee assessed penalties against some 28 agents totaling \$3,500.

d. Bonding and Canceled Voyages

TAPC requires that agents who are appointed in Metropolitan List Territories be covered by surety bonds in amounts based on the expected sales of the agent. A single bond covers one agent for the benefit of all appointing lines. The premium of the bond is paid by the conference, but the agents pay annual fees in amounts which vary in different cities. These fees help defray premium and other expenses of the conference in administering its agency program. The conference lines are not required to be bonded, and on at least one occasion a member line was unable to pay a commission because of financial difficulties. On other occasions, when sailings were canceled after bookings had been made, commissions were not paid to the agents even though they had fully performed the service of booking the passage and had nothing to do with the cancellation of the sailings. There

appears to be no conference regulation relating to the payment of commissions on canceled voyages. However, some lines pay half commission, other full commission on canceled voyages.

e. Tenure and Cancellation of Eligibility

The conference rules provide that either an agent or its appointing line may terminate an agency at any time. In addition, the Control Committee may remove names from the Eligible List if it finds a breach of conference rules by the agent, unethical business standards, an inability on the part of the agent adequately to create and stimulate the sale of transportation, or failure of the agent to effect the sale of a sufficient number of bookings. In the years 1957 through 1960, 19 agencies were terminated due to an alleged insufficiency in the number of bookings produced by the agency and 17 for other reasons. Four of the latter were subsequently reinstated.

No precise standards relative to what might constitute a sufficient number of bookings by an agent have been set up. The local subcommittees have established minimum booking requirements for approved agents in their respective jurisdictions, but the standards were not considered absolute and the Control Committee has on occasion exercised an ad hoc judgment in the application of these requirements. In New York the minimum was set at 50 bookings per year within the city limits and 30 in the suburbs. Twenty-five was the minimum in Philadelphia and Chicago, 30 in San Francisco, 10 in Los Angeles, and no minimum was set for Boston. The agents were not informed of these standards. The Control Committee has exercised final authority in terminating the eligibility of agencies according to which, "Each case was handled on its own merits depending on the circumstances surrounding the case." Agents have not been

afforded a hearing or a right to have the action of the Control Committee reviewed.

The standards of performance and other grounds for termination consist solely of the general norms quoted above.

D. PRACTICES OF APC WITH RESPECT TO LEVEL OF AGENTS' COMMISSIONS

As noted above, the TAPC exercises authority over all agency relationships and practices at issue in this proceeding except the level of agents' commissions which is the province of the APC. Under the APC agreement, unanimous approval is required by the membership of the APC before the level of commissions paid to agents may be raised. Thus, an increase in the level of commissions requires the affirmative vote of the six member lines which serve only Canadian ports. Meetings of the APC are conducted on an informal basis and a vote of the members is neither taken, recorded, nor filed with the Commission. The conference records show that from about October 1950, all lines have shown a willingness in principle at least to increase the level of agency commissions. However, in 1950 and in 1951 subcommittees of the APC were unable, because of the conference's Unanimity Rule, to recommend a proposed increase in commissions, although the majority was prepared to increase the commission from 6 to 7½ percent on "all classes, all seasons." The 1951 subcommittee stated that "while there was a strong majority in favor of applying a 7½-percent commission to all classes throughout the year, it was not possible to reach unanimous agreement," and "it was, therefore, suggested that the matter be deferred for consideration at the statutory meeting in March 1952." The subcommittee did not have the power to take final

action, but its function was to recommend action to the principals.

In 1951 the conference increased the commission to 7½ percent, except on passage booked during the high volume summer season where a 6-percent commission remained in effect. Proposals to increase commissions were taken up and action was deferred at meetings in 1952 and 1953. A 1952 subcommittee noted that "unanimity could not be reached on a proposal to extend the off-season commission basis (7½ percent) to bookings for seasonal sailings." The question was taken up again in 1956, when the present commission of 7 percent on all bookings was established. Since that time, representatives of travel agents have sought increases in the commission levels but have been told that commission levels have not been raised since 1956 because the APC has had difficulty in achieving unanimity.

Evidence adduced by the conference demonstrates that differences between members over agents' commissions are usually eliminated or compromised, the minority giving way eventually to the majority. Conference witnesses testified that neither a single member nor a small minority has ever vetoed proposed conference action on commissions. It is impossible to tell from the conference's sketchy minutes if this is true. However, it is certain that under the present Unanimity Rule a single member could veto an action to increase agents' commissions even though the action was desired by all the other members. The executives of the American-flag lines which are members of APC and who testified at the hearing, stated that because the Americans were a minority in the conference, the Unanimity Rule was necessary to protect their interests. The record indicates, however, that the American lines have often been in the vanguard for com-

mission increases and as near as can be determined have never blocked proposed increases. Under the conference agreements the decision to change the Unanimity Rule to a majority rule or some other rule that would require the consent of less than the full membership, would itself require the unanimous consent of all conference members.

E. DIVERSION OF PASSENGERS TO AIR CARRIERS

At present both air and ocean carriers pay 7 percent commissions on regular point-to-point bookings, and 10 percent on their respective portions of so-called foreign inclusive tours. It takes approximately three or four times as much of an agent's time to sell sea as compared with air space, and several years of experience are required to produce a really competent steamship passage salesman. Because of this, appointed agents tend to push air rather than sea travel. The record indicates that one of the primary factors in determining the level of commissions has been the competition of air travel.

THE EXAMINER'S DECISION

The parties agree that the initial decision of the examiner correctly disposes of most of the issues raised in this proceeding. We summarize below those portions of the decision to which no exception is taken:

After a brief discussion in which he approved of the exercise of some conference control over travel agents and noted that ASTA was also in favor of such control (Initial Decision, 49-50), the examiner adopted the following statement of Hearing Counsel as criteria for determining what constitutes a violation of section 15 of the Shipping Act, 1916:

Any provisions of TAPC Agreement No. 120 or APC Agreement No. 7840, or any regulations or rules promulgated thereunder, which prevent

travel agencies in the United States from rendering complete and effective service both to passengers and to ocean carriers operate to the detriment of the commerce of the United States. All conference-imposed restraints which prevent the travel agent from properly performing his function of selling ocean transportation for which no reasonable justification exists, should be eliminated by the Commission's disapproval, cancellation, or modification of the subject agreements * * *. (Initial decision, p. 52.)

In addition to the above, the examiner further concluded that "unreasonable restraints against qualified persons who seek to become travel agents would also be detrimental to commerce."

The examiner in light of these criteria then considered the areas of interaction between the conferences and the travel agents, discussed above in the factual statement, and reached the following conclusions:

A. TAPC PRACTICES

1. *Appointment*

The conference (TAPC) has failed to adopt, publish, and promptly and consistently apply uniform standards of background and qualifications in its selection of applicants for placement on the list of eligible agents in Metropolitan List Territories. This failure is detrimental to commerce and contrary to the public interest, within the meaning of section 15, because it detracts from the ability and the willingness of the corps of agents, or potential agents, to foster and sell steamship travel. Thus, the conference must adopt, publish and apply a set of uniform, objective, standards in the screening of applicants that are sufficiently precise, and well defined to give adequate notice to applicants of the requirements. No other standards should or may be employed. The

standards of eligibility must be published and made available to all applicants in order to give meaning and effect thereto and every applicant who meets them must be approved. Similarly, conference action on each application must be taken promptly and the applicant notified promptly of the decision and the reasons for whatever action is taken. These reasons should not be stated merely in general terms but must relate specifically to the adopted standards of eligibility.

Respondents have explicitly consented to revise their agreements so as to provide a set of uniform objective standards for screening applicants in the Metropolitan List Territories, sufficiently precise and well defined to give applicants adequate notice of the requirements they must meet. Respondents have further agreed to the publication of such standards and to prompt notification of the action taken with respect to all applicants for appointment as agents.

a. The Sponsorship Rule

The Sponsorship Rule must be discontinued as it has resulted in the exclusion from the Eligible Lists of qualified agents, to the detriment of commerce. Respondents have agreed to remove the Sponsorship Rule.

b. The Quota System

The Quota System must also be discontinued for the same reason that requires discontinuance of the Sponsorship Rule. The number of agents already on the Eligible List has no bearing on the question of the qualifications of a new applicant. If an individual line has all the agents it feels that it requires, it is of course not required to appoint an agent newly placed by the Control Committee on the Eligible List. Respondents have agreed to remove the Quota System.

c. Other TAPC Selection Practices

The Fulton Street Rule and the Department Store and Automobile Club Rules must be abolished, as they have resulted in the arbitrary exclusion of agents to the detriment of commerce. The Freight Forwarder Rule must be submitted to the Commission for approval. The Commission can then consider the proposal under its customary procedures and after obtaining the views of all interested parties make a determination as to its validity under section 15. The respondents have agreed to abolish the Fulton Street Rule, the Department Store and Automobile Club Rule, and they have further agreed to file the Freight Forwarder Rule with the Commission.

2. *Control of Agencies After Appointment*

a. Sale or Transfer of Agency or Change in Officers or in Address or Name

The same administrative fairness must be afforded when the conference considers an application for approval of the sale, transfer, or change of the officers of an agency that is required in reference to the consideration of original applicants and for the same reasons. The conference rules must provide reasonable standards in regard to the consideration of sales and transfers and changes of officers, including adequate notice of the standards to applicants, and an opportunity for the agent to be heard. The rules must further provide for prompt action in accordance with the standards adopted and for prompt notice to the agent of the action taken together with the reasons therefor. A system of arbitration for review of conference action will not be required as, in the case of the screening of applicants, relief from arbitrary conference action or other violations by the conference will be afforded upon complaint filed with the Commission.

The respondents have agreed to the adoption and application of reasonable standards regarding the consideration of sales and transfers, and of changes in name, address, or officers in appointed agencies, including procedures for notice thereof to applicants, for opportunity to be heard and for prompt action on such requests.

b. Fines and Penalties

The conference must adopt and apply definite standards for the assessment of liquidated damages, providing for adequate notice thereof and for opportunity of accused agents to be heard, and for prompt report to the Commission of any liquidated damages assessed. Respondents have agreed to adopt and apply definite standards for the assessment of liquidated damages, providing for adequate notice thereof and for opportunity for accused agents to be heard, and for prompt report to the Commission of any damages assessed.

c. Bonding

Bonding of carriers against loss of commissions caused by cancellation of voyages or line insolvency is not required. There is no evidence that suitable bonds are available, and instances of financial failure by the lines are very rare.

d. Tenure and Cancellation of Eligibility

The conference must adopt and apply definite objective standards for cancellation of the eligibility of agents. The agent against whom allegations are made should be notified of the delinquencies with which he is charged and afforded an opportunity to confront those who made the charge and to adduce evidence to refute it, or in the alternative a reasonable time to correct the delinquency. The rules should require that the conference secretary must be in-

formed in writing of all cancellations by member lines individually including the reasons therefor, records of which must be kept for a reasonable time in order to permit the Commission to assure itself that multiple cancellations of a particular agent are not being employed to circumvent the restrictions on conference action. Respondents have agreed to adopt, publish, and apply a set of definite objective standards for the cancellation of the eligibility of agents, and to the provision of a reasonable time after warning to correct delinquencies or adduce evidence to refute them (except in the case of default by an agent or the cancellation of his surety bond).

B. SECRECY OF CONFERENCE ACTION: VOTING

Because of the public interest in the operations of the conferences, they should be required to take and record the votes of the members, keep detailed minutes of all matters coming before meetings, retain records of meetings for a reasonable time and provide copies to the Commission. (Initial Decision, 68-69.) Respondents have agreed to provide the Commission with full minutes of meetings indicating votes of the member lines.

DISCUSSION AND CONCLUSIONS

We agree that the examiner correctly disposed of the foregoing issues and we adopt his findings and conclusions thereon as our own. We now turn to the issues raised on review by the parties in their exceptions to the initial decision.

A. THE UNANIMITY RULE AS APPLIED TO THE LEVEL OF AGENTS' COMMISSIONS

The examiner found that there was no showing that the Unanimity Rule as applied to agents' commissions had operated to the detriment of the commerce of

the United States, and that there was no showing that a different voting rule would have allowed increased commissions.

In addition, he found that "there exists at present a substantial equilibrium between the commissions paid by the air and ocean carriers in this trade in that both pay 7 percent on regular point-to-point bookings." He said it could not be concluded that the failure of the conference to increase commissions as requested by the agents has led to a competitive disadvantage of the conference lines relative to the airlines. In the examiner's view it was more logical to conclude that if the adoption of a majority rule resulted in an increase in commissions, the airlines might find it necessary to succumb to pressures from the travel agents and meet this new competition caused by the disparity in the commission rates by an increase of their own and thus begin leapfrogging the steamship commission rate. The examiner further conjectured that increases in fares would probably follow, to the prejudice of the traveling public and the detriment of commerce.

The record in this proceeding compels us to overrule the examiner on these findings and conclusions. The record shows many instances in which the existence of the Unanimity Rule has blocked or at least delayed the fruition of a desire on the part of a majority of the lines to increase the levels of agents' commissions.²

Respondents' arguments that the evidence refers only to the desires of a subcommittee which did not have the power to take final action is of doubtful value here. The determinations of the subcommittee may not have been of the kind dictating final action, but they are apparently conditions precedent to any

² See sec. D of the Statement of Facts, *supra*.

conference action with respect to the level of commissions. Although it is true that the principals on occasion took actions other than those recommended by the subcommittee, these appear to have been in the nature of a watering down of actions favored by at least a majority of the lines. There is no indication from the record that the principals ever instituted any action regarding agent's commission levels without the concurrence of at least a majority of the subcommittee. The record, moreover, affirmatively shows that a lack of unanimity on several occasions prevented the subcommittee from even reporting the positions of the member lines to the principals.

The effect of the Unanimity Rule on the actions of the principals is of course rendered less clear because of the conference's failure to keep complete minutes of its meetings and to file them with the Commission. By its own admission, the conference purposely adopted this practice because of its concern over the American antitrust laws. It is undeniable, however, that under present conference procedures a single vote could block a proposal on commission matters even though the proposal was favored by an overwhelming majority of the member lines.

The record clearly shows that agents tend to push air travel rather than sea travel, mainly because it takes considerably longer to handle the details of sea travel. Time is money and the fact that the travel agent is able to sell more air than sea bookings in a given time period means, as ASTA correctly contends, that the effective commission rate of the steamship lines is lower than that of the airlines. Under this reasoning the "substantial equilibrium" found by the examiner becomes superficial.

The record contains some evidence of instances in which the diversion from sea to air passage has taken

place against the best interest of the prospective passengers. However, this evidence related solely to the activities of agents who were not appointed by the conference lines. While it cannot be said these agents owed any duty to those lines, the fact remains that the diversion was not in the interests of the conference lines themselves. They have realized this and have attempted to solve the diversion problem by proposals to increase the level of agents' commissions. But the proposals have been blocked, delayed, or weakened because of the existence of the Unanimity Rule. Perhaps for economic reasons it is not feasible for the lines to raise commission levels at the present time. Nevertheless they should at least be allowed to increase commissions unhampered by the veto power inherent in the Unanimity Rule should they desire to do so.

There is no evidence in the record indicating that the airlines could or would increase their commission level, or would in fact need to do so, if the steamship lines voted by majority rule or some other rule requiring less than unanimity to raise the commission level on sea passage.

We feel that the Unanimity Rule must be discontinued as it applies to the deliberations of the subcommittees and of the principals on the levels of agents' commissions. It is a regulation which prevents travel agents in the United States from rendering complete and effective service both to passengers and to ocean carriers. It has in some cases prevented the principals from even considering the question of commission levels and in others has defeated, or at least delayed or watered down the desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage vis-a-vis the airlines. We think the Unanimity Rule plainly

operates to the detriment of the commerce of the United States.

B. JURISDICTION OVER THE LEVEL OF COMMISSIONS PAID TO TRAVEL AGENTS

The examiner who presided at the hearings excluded evidence relating to commission levels. The precise reason for this is not certain, but it appears he either believed the issue was not meant to be included in the investigation or that our jurisdiction does not extend to the level of agents' commissions. Subsequently, Examiner Seaver refused to rule on the jurisdictional question, as he found there was not in any event sufficient evidence in the record to support a finding that the present level of commissions is so low as to be detrimental to the commerce of the United States. The parties to this proceeding, however, have specifically raised the question of our jurisdiction in their exceptions and replies to exceptions and it seems to us it would be useful from a regulatory standpoint to deal with the question.

To begin with, it is clear that the order of investigation encompasses all activities in which the conferences engage affecting travel agents pursuant to the agreements here under consideration, and the fixing of the level of agents' commissions is one of such activities. We also think it is clear that we have jurisdiction over the level of agents' commissions set pursuant to conference agreements. We do not claim jurisdiction to set the specific level of compensation. Nor may we rule on the reasonableness of commissions fixed by individual carriers operating in our foreign commerce. What we are here concerned with is concerted activity which is permissible solely by virtue of an agreement approved under section 15. That section provides in relevant part:

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, * * *.

Thus, the jurisdiction here involved is that which directs us to disapprove, cancel, or modify an agreement when the activities of the parties thereunder are incompatible with any of these standards. If we were to find that the respondents acting pursuant to their respective agreements had in concert fixed commission levels which were, for example, detrimental to the commerce of the United States or contrary to the public interest within the meaning of section 15, we would not only be authorized but would have the duty to withdraw or modify our approval of the agreements under that section.

Respondents argue that our jurisdiction does not extend to the level of commissions because the commissions are paid to persons not subject to the Act. Without considering whether under any circumstances travel agents may be subject to the act, respondents' argument misses the point. Our jurisdiction under section 15 is over agreements. Respondents' argument is necessarily grounded on the premise that the agreement regarding commission levels is between the agents and the carriers, which of course is not the fact. It is between common carriers by water all of whom are subject to the Act. Our jurisdiction extends to the entire agreement and all of the activities thereunder and it necessarily embraces the very

act of fixing the level of agents' commissions. This conclusion is by no means novel. The Commission and its predecessors have repeatedly asserted jurisdiction under section 15 over the concerted establishment of the levels of brokerage paid to brokers by conferences operating pursuant to approved agreements. It has been repeatedly held, moreover, that the use of conference power to invade or affect third party interests is subject to regulation and control under section 15. *Agreements and Practices Pertaining to Brokerage*, 3 U.S.M.C. 170 (1949); *Pacific Coast European Conference (Payment of Brokerage)*, 4 F.M.B. 696 (1955); *Practices and Agreements of Common Carriers*, 7 F.M.C. 51 (1962); *Pacific Coast Port Equalization Rule* 7 F.M.C. 623 (1963).

C. THE PRESENT LEVELS OF AGENTS' COMMISSIONS

ASTA requests that we hold that the present level of agents' commissions is so low as to be detrimental to the commerce of the United States. We are unable to make such a finding upon the present record. ASTA itself points out that before such a finding could be made, it would be necessary to determine that the present level of commissions is so low as to be "unremunerative, noncompensatory, or a burden on ASTA's other services" and hence detrimental to commerce. *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 773 (1946).

Although there are many general statements in the record by travel agents about the difficulty of operating at the present commission levels, we agree with hearing counsel and the examiner that the record in this proceeding does not support a finding that the level of commissions is unreasonably low. Hearing Counsel takes the position, with which the examiner agreed, that the record "contains no direct and reli-

able evidence" upon which to disapprove the present level. This is, we think, of particular significance when it is borne in mind that (except for one minor exhibit mentioned below, exhibit 106) the evidence upon which ASTA asks us to make a determination is that adduced by hearing counsel.

The record does show a decrease in the relative number of steamship bookings in relation to total bookings. But it is not established that the level of commissions is the primary reason for this. The problem of diversion of passengers from sea to air does exist, and it is a problem which the lines have attempted to solve by increasing the commission level. But it is undisputed that the enormous growth in air travel is largely attributable to factors unrelated to the steamship passenger industry, such as the increased seating capacity and speed provided by the new jet aircraft, and the introduction of many new foreign air carriers serving the United States.

Exhibit 106, the only one which ASTA presses in its brief which it claims is not covered by the evidence introduced by hearing counsel, merely shows the rapid expansion of the airlines. It does not show that the agents are being forced out of business or losing money through the sale of sea bookings.

We do not imply that we feel the present commission levels are necessarily proper. We hold only that on this record there is not a sufficient showing for us to declare that such levels are detrimental to the commerce of the United States or otherwise unlawful under section 15.

D. THE UNANIMITY RULE AS IT APPLIES TO SELECTING AGENT APPLICANTS FOR METROPOLITAN ELIGIBLE LISTS

The examiner in his initial decision found that the Unanimity Rule as applied to the selection of agent

applicants for the Eligible Lists in the Metropolitan List Territories was so detrimental to the interests of agents, or prospective agents, as to be detrimental to the commerce of the United States. He therefore concluded that rule should be discontinued. Respondents except to this conclusion.

We feel that the examiner was correct. The Unanimity Rule has acted as an unreasonable restraint against qualified persons who seek to become travel agents. It has on several occasions prevented the Control Committee from even considering applicants for the Eligible Lists because of its use by local committees. It is capable of allowing one representative on the Control Committee to "blackball" any applicant and exclude him from appointment by the rest of the lines, though all of them may favor his selection. The rule has been denounced by a chairman of a local committee as "extremely detrimental to the best interests of the majority lines," and it has been used on at least one occasion in an attempt by lines to trade votes.

We hold that the Unanimity Rule must be discontinued in all actions by the conference, both by local subcommittees and the Control Committee, relating to the selection of agent applicants for the Eligible Lists. The rule, of course, is unnecessary to protect the freedom of individual lines in the actual appointment of their agents since the individual lines are free to appoint or not, as they see fit, any applicant placed on the Eligible Lists.

E. THE UNANIMITY RULE AS IT APPLIES TO VOTING ON AGENCY SALES, TRANSFERS OR CHANGES OF OFFICERS OR LOCATIONS

It is uncertain whether the examiner meant to outlaw the Unanimity Rule as its applies to agency sales, transfers, or changes of officers or locations. Hearing

Counsel appear to feel that the examiner's conclusions against the Unanimity Rule extended to these matters. In the interest of clarity we think a specific ruling should be made.

Our opinion is that the Unanimity Rule must be discontinued with respect to sales, transfers, or changes of agency officers or locations. It has the same injurious effect in this area that it has in the selection of agents for the Eligible Lists. The record shows that the Unanimity Rule has been instrumental in allowing the veto of an agency transfer and makes it possible for a member of the Control Committee whose line has not appointed the agency in question to block a transfer or change in personnel. These consequences are unreasonable restraints which deprive travel agents of the ability freely to dispose of property rights and interfere unduly in the conduct of their business. In our view, the Unanimity Rule is contrary to the public interest. It also may possibly operate in some instances to the detriment of the commerce of the United States.

F. THE TIEING RULE

The examiner held that the so-called "Tieing Rule," the conference procedure which prohibits appointed agents from selling transportation on nonconference lines, was unlawful as the record did not demonstrate that it was necessary to promote stability in rates or to combat destructive competition. Such tieing arrangements generally run counter to antitrust principles. *United States v. General Motors Corporation*, 121 F. 2d 376 (7th Cir. 1941), *cert. den.* 314 U.S. 618, and *Vitagraph, Inc. v. Perelman*, 95 F. 2d 142 (3d Cir. 1936), *cert. den.* 305 U.S. 610.

Respondents object to the examiner's conclusions, arguing that he applied strict antitrust principles in determining the validity of the Tieing Rule. We think

respondents have misconstrued the examiner's conclusions. He applied traditional Shipping Act concepts in determining that the rule was invalid. Section 15 affords antitrust exemption to the parties to an anti-competitive agreement when that agreement is approved by the Commission. Particularly where the rights of third persons are affected, this exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered. As the examiner stated, "the Commission must make sure that the conduct it legalizes under section 15 does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the act." *Isbrandtsen Co. v. United States*, 211 F. 2d 51 (D.C. Cir. 1954), *cert. den.* 347 U.S. 990 (1954). The examiner considered those factors which respondents argue are the proper ones, namely rate stability and destructive outside competition, and he weighed the restriction imposed on agents by the Tying Rule against the possibilities were the rule abolished. He concluded, as we do, that no adverse consequences would flow from the abolition of the rule.

Respondents now admit that the Tying Rule is not necessary to protect the conference from outside competition, but claim that it is necessary to maintain stability within the conference. They argue that without the Tying Rule the conference would disintegrate. The record, however, contains no evidence demonstrating that anything of that sort will happen. We note that respondent lines operate Caribbean cruises without the benefit of a tying rule and no adverse consequences have resulted.

G. PAYMENT OF COMMISSIONS ON STRIKE-CANCELED VOYAGES

The examiner found that the conference, as a collective practice, refused the payment of commissions on

voyages voluntarily canceled. Finding such collective action to run counter to the interests of our foreign commerce, he ruled that the practice should be discontinued. ASTA supports this ruling and also urges that it be extended to cover the case of voyages canceled because of a strike.

Respondents state, and we agree with them, that the examiner erred in finding that the refusal to pay commissions on canceled voyages was the result of conference action. There is nothing in the record which would indicate that collective action of the respondents dictates the payment or nonpayment of commissions on canceled voyages. There is testimony that some lines pay half commission, others full commission, on canceled voyages. Hearing Counsel, in the course of the hearings, admitted that it "may be a fact" that there is no conference action with respect to commissions on canceled voyages.

There is nothing in the conference agreement that can be disapproved with respect to these payments or nonpayments. If some lines refuse to pay the commissions, they may have reached individual understandings with agents covering the matter. But in any event, we cannot say on this record that the refusal is unlawful.

H. VOTING BY LINES WHICH DO NOT ENGAGE IN THE FOREIGN COMMERCE OF THE UNITED STATES ON THE LEVEL OF COMMISSIONS PAID TO THEIR AGENTS IN THE UNITED STATES

The examiner found that "while unanimous approval of the membership of APC would be required to raise the rate of commission, at least seven of the members engage in little or no service to or from the United States." His difficulty with the voting by lines serving the contiguous Canadian trade was their power to exercise, through the Unanimity Rule, a veto

over matters affecting travel agents in the United States. He ruled that "lines which do not engage in the foreign commerce of the United States should not be permitted to vote on the level of commissions because the compensation paid to agents here is none of their concern."

Respondents contend that the examiner erred in this ruling if it was thereby intended to exclude lines calling only at Canadian ports from voting on levels of commissions paid to their agents in the United States. Both ASTA and hearing counsel state that they have no objection to such lines voting on commission levels if the Unanimity Rule is discontinued. Since we have ordered the rule eliminated as it applies to the level of commissions, the question reduces itself to one of whether the lines serving only Canadian ports should be denied any voice respecting the level of commissions paid to their agents in the United States.

It is sufficient for our purposes here merely to say that, with the Unanimity Rule having been eliminated, we have no objection to such lines having some voice in commission matters, and that proposed solutions to this problem may be submitted with the amended agreements. It may be noted, also, that at least one line serving only Canadian ports has indicated that it does not desire to vote on commission levels for agents in the United States.

Our ultimate conclusion is that Agreement No. 7840 of APC and Agreement No. 120 of TAPC and the rules adopted thereunder, insofar as they relate to travel agents, are contrary to section 15 of the Shipping Act in the respects and for the reasons noted above and must be modified in accordance with this decision.

Respondents shall within 60 days submit to us for review and approval proposed modifications of the

agreements and rules consistent with this decision, as per our order attached. The views and comments of interested parties will be invited upon the specific language of the proposed modifications and the proceeding will be held open pending further order of the Commission.

COMMISSIONER PATTERSON, *concurring and dissenting*:

Based on the record before me in this proceeding, my conclusions are as follows:

First, I concur in the result reached in the preceding report as to—

(1) The majority's concurrence with the initial decision of the examiner as summarized in its report to show those portions as to which no exception is taken. It is understood that the respondents have agreed to revise many of the provisions objected to by the travel agents (first paragraph under "The Examiner's Decision").

(2) The majority's agreement with the examiner on the requirement of unanimous consent in selecting among applicants for travel agents status to be placed on a list of eligible applicants for ticket selling agencies (item (4) under "Discussion and Conclusions").

(3) The majority's agreement with the examiner on the requirement of unanimous consent in voting on agency sales, transfers of agency locations, or changes of officers (item (5) under "Discussion and Conclusions").

(4) The majority's decision that there is nothing in the record to indicate that collective action of the lines dictates the payment or nonpayment of commissions on canceled voyages (item (7) under "Discussion and Conclusions").

(5) The majority's decision not to "rule on the interest which we feel it is necessary for a line to have in the foreign commerce of the United States before it can vote on the level of compensation paid to its agents here" (item (8) under "Discussion and Conclusions").

Second, I dissent from the Commission's majority decisions as follows:

(1) Disapproving, unless modified, of the agreement to apply a unanimity rule to the level of agents' commissions (item (1) under "Discussion and Conclusions").

(2) Disapproving, unless modified, of the agreement to prohibit travel agents from selling transportation on nonconference or independent carriers (item (6) under "Discussion and Conclusions").

(3) Deciding that we have authority to regulate the level of commissions paid to travel agents and that we should take no action at this time on the level of commissions (items (2) and (3) under "Discussion and Conclusions").

As regards my "Second" conclusion as stated above, the reasons for my dissent are advanced as follows:

INTRODUCTION

We are concerned with the approvability under section 15 of the act of certain terms of the Trans-Atlantic Passenger Steamship Conference General Agreement, adopted January 14, 1929, and as amended to the latest approved amendment on March 13, 1961, and with the Atlantic Passenger Steamship Conference Agreement dated London, February 12, 1946, approved by a predecessor agency on August 29, 1946.

According to the numbering, Agreement No. 120 has been amended 76 times, and as of December 21, 1960, Amendment 120-76 shows 24 signatory members. No amendments are in the record for Agreement No. 7840, which has 15 signatory members. Headquarters of the former are in New York, and of the latter, in Folkestone, England, Great Britain.

The proceeding involving both agreements is called a "general investigation" and was started by a predecessor agency on November 2, 1959, after an informal complaint on October 22, 1958, by the American Society of Travel Agents, Inc., concerning certain practices of the Atlantic Passenger Steamship Conference.

As a result of this investigation, the majority has decided that certain provisions of these agreements now violate section 15 of the act, although before the date of its report these provisions have been lawful and predecessor agencies have been fully informed of all revisions of these agreements. The agreements relating to commissions which are now found to be illegal are:

(1) *Agreement No. 120. Article D. "Passage fares and rates of commission and all conditions relating thereto, shall be in accordance with the provisions of the Atlantic Passenger Steamship Conference Agreement and the rules and regulations adopted thereunder"* (exhibit 1, p. 9).

(Agreement No. 120 does not control commissions, but by this provision delegates the function to the body operating under Agreement No. 7840.)

(2) *Article E. "Agencies. (a) The member lines shall confine the sale of their transportation to: (1) Line's Own Offices. * * * (2) General Passenger Agencies—i.e., agencies appointed by*

a Line on a commission basis to control a specified territory in which sub-agencies are appointed who must report to such agencies * * * Paragraph (e) of Article E prohibits a sub-agency " * * * from selling passage tickets for any steamer not connected with the fleets of the member Lines for which it has been duly appointed * * * if such steamer is operating in any competitive trans-Atlantic trade * * *". The member Lines agree to use a uniform "Sub-Agency Appointment Agreement" (Rule E-2). The prescribed terms of such agreement obligate the agent "to adhere to and comply with * * * the annexed rules * * *". Rule 5 annexed, called the tying rule, provides that "the agent is prohibited from booking passengers for any steamer not connected with the fleets of any of the member lines" and otherwise closely follows the language quoted above from paragraph (e).

(3) *Agreement No. 7840*. Article 6. "(a) Rates of Commission and Handling Fees which Member Lines may pay to their General Agents or Sub-Agents shall be established by unanimous agreement of the Member Lines" (exhibit 2, p. 9).

DISSENT NUMBER (1)

The majority does not question the validity of establishing rates by majority agreement or, as far as I know, by some other ratio, but concludes that the "unanimous agreement" obligation (the expression "unanimity rule as it applies to agents' commissions" is used) is invalid under section 15.

I dissent from this conclusion and the disapproval of the agreement under section 15 that results therefrom. First, the reasons adduced do not support such

a conclusion; and, second, there are other reasons which support the unanimous agreement obligation in article 6, paragraph (a), of Agreement No. 7840.

The two respondent conferences are successors of conferences in the transatlantic passenger steamship industry going back to 1879 or before. The North Atlantic Steam Traffic Conference met for the first time on March 5, 1868, in New York. This conference's agreement of 1879 provided in clause 19 that "all questions that may come before the Conference for action, must be decided by the unanimous vote of all members present, to be of any effect" (exhibit 119). Unanimous consent clauses of one sort or another are in conference agreements of 1885, 1894, 1921, 1928, and 1930 (exhibit 119). The record showed that commissions to subagents were originally fixed at fixed dollar amounts per passenger depending on destinations.

A Continental Conference meeting was first held in New York on May 4, 1885. The minutes of the meeting showed commissions to subagents were fixed.

The Atlantic Conference was re-formed in 1921 after the First World War. Eight years later, in 1929, the formerly separate conferences of Mediterranean, Continental, and North Atlantic lines joined in the one Trans-Atlantic Passenger Conference.

During all this time a unanimous consent was required with respect to decisions affecting each member's business affairs. One would think that such a long tradition behind an historically established business practice would require fairly compelling reasons of public policy to overturn it at this late date. A review of the majority's reasoning is enough to show this is far from the case.

The majority's significant reasoning opposing the unanimity rule (or regulation) is in the following discussion:

It is a regulation which prevents travel agents in the United States from rendering complete and effective service both to passengers and to ocean carriers. It has in some cases prevented the principals from even considering the question of commission levels and in others has defeated, or at least delayed or watered down desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage vis-a-vis the airlines. We think the Unanimity Rule plainly operates to the detriment of the commerce of the United States.

As I understand the reasoning, preventing or delaying consideration of commission levels, and delaying the desires of a majority to raise commission levels is thought to prevent complete and effective service and such a result is a detriment to commerce.

To me, this is tantamount to saying that the obligation has been effective in preventing increased commissions. The obligation has had a deterrent effect within the conference, as the majority recognizes. Effectiveness within the conference is not the issue. The effect of the obligation on the public and on our commerce is the relevant test. The majority seems to assume without the need to prove that if it can show the obligation allows "one single vote" to "block a proposal on commission matters even though the proposal was favored by an overwhelming majority of the member lines," then it has automatically shown public injury. This does not follow at all. Some connection between cause and effect has to be shown. The effect of a veto threat is to cause injury to carriers desiring a change, but not to commerce in general or to the public. Perhaps a casual link is thought to be provided when it is said the lines "should at least be allowed to increase commissions unhampered by the veto power inherent in the Un-

nimity Rule should they desire to do so." Significance is given to this statement only the conclusion that such a regulation "prevents travel agencies in the United States from rendering complete and effective service both to passengers and ocean carriers * * *." One can only speculate that the twice-mentioned inability to increase, rather than reduce, rates has somehow prevented complete and effective service, but the way this happens as well as the effect it would have on the carriers and on the traveling public segment of our commerce should be clearly shown. It is doubtful much of a relation can be shown if it is based on increases, because the non-unanimity rule makes it equally easy to reduce commissions. At the moment, travel agents seem to be motivated by the apparent desire of many carriers to raise commission percentages. This is only a transitory economic factor. When we deal with a matter of principle such as this, or with a historically established general rule for conducting business, we ought to be governed by long-term economic factors. The closest we get to a relation to commerce and the public interest is the thought that steamship lines are "at a competitive disadvantage vis-a-vis the airlines." Even this is referred to only as "some evidence" and it "related solely to the activities of agents who were not appointed by conference lines * * *." Unfortunately, it is only a judgment that is not even supported by the most interested parties, the respondent carriers, much less the record herein.

Since the evidence of airline competition falls so short of conclusively proving the point, it is said there is diversion anyway and this is "not in the interests of the conference lines themselves." Changing choices as to the method of travel involve only speculation as to the reasons for diversion. What causes the diver-

sion is only theory, is not supported, and is even denied by the conferences. The airline diversion reasoning is at best inconclusive.

To the extent economics are relevant, this record is devoid of data showing the effect of a change in commissions either up or down on the respective parties or on the public. Naturally, the travel agents want more money, but we would have to know a great deal more than we can learn from this record as to the effect of an increase on passenger fares and on the precarious competitive balance that now seems to exist between ocean and air transportation. Passenger choices would seem to be governed as much by convenience and pleasure as by economics or passenger agent activity.

The second point is that the better public-interest arguments, if anything, favor the validity of the obligation to not change commission rate levels without unanimous consent. The rule of group action by majority vote actually strengthens the power of the group, because it puts the full power and influence of all the members of the group behind an action affecting the public even though some of the individual members do not agree with the action. Less than all the members have the power to direct group action. A unanimity requirement, on the other hand, weakens the group's power to act by giving a power to prevent action by a veto over decisions. If antitrust law overtones are to be injected into our policy considerations, then anything which lessens the power of a group which makes dominating pricing decisions is to be favored. U.S.-flag lines are a minority in most conferences, and the rule enhances their power to influence group decisions or to protect themselves from oppression by the business needs of non-American lines. Generally the business needs of non-American mem-

ber lines are dictated by more favorable cost considerations than our own. There is a serious question as to whether the undoubted loss of flexibility of action implicit in a unanimity rule is overcome by the detriments that may be caused by the economic power of a group dominated by majority votes of non-American lines.

DISSENT NUMBER (2)

The majority disapproves the so-called tying rule of article E. I dissent from this disapproval.

Both article E of Agreement No. 120 and the related "rule" and prescribed terms of agency agreement, with minor revisions and with the approval of our predecessors, have existed since 1933. Other forms of the obligation have existed even before then. The so-called Alexander report, which preceded the enactment of the Shipping Act, acknowledged that agreements existing in 1913 provided that: "(11) Agents of the lines which are parties to the agreement shall not interest themselves in the booking of passengers for new outside competing lines." (*Investigation of Shipping Combinations Under House Resolution 587, Hearings Before the House Committee on Merchant Marine and Fisheries, 62d Cong., 2d sess. (1913), vol. 4, pp. 31-34 at p. 33.*) The obligation and rule were not shown to have been disapproved between 1916 and 1933, nor subsequently, so the tying obligation also has long historic acquiescence behind it. One would expect new factors and compelling reasons to overturn such an obligation after at least 48 years of use in one form or another, but this is not the case here either.

Against this background the majority refers to the examiner's statements that (1) there is no need for the rule; and (2) "tying arrangements generally run counter to antitrust principles." The majority says the respondents have misconstrued these statements. The

further comment is made that the antitrust "exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered."

On the first point, the need or necessity test is not expressly made a standard of approval or disapproval under section 15. Lack of competitive "need" or "necessity", or because the agreements can be characterized as "tying" arrangements which "generally run counter to antitrust principles," may have been equated with detriment to commerce as being against the public interest, but the link is not revealed.

The competitive necessity problem was not explored nor developed in this record. Even assuming this to be a valid test, the absence of any demonstration in this record proves nothing; it simply is not a basis for decision. If competitive necessity is to be a test, some effort should have been made to develop the facts on the point. Without the facts, it is no wonder the record "did not demonstrate" anything. Since the burden is on the Commission to approve unless we can show detriment or contrariety with public interest, we may not invert the burden at the last minute and say the respondent did not prove enough. It is up to the Commission to do the proving and disproving on this issue.

The second point, that tying agreements generally run counter to antitrust principles and are an anti-competitive practice, is not established. There was no exploration of what antitrust law might be applicable to the facts herein. Some tying agreements may be contrary and some not, but it is necessary to establish what type this one is and what law applies to it. Section 15 exempts agreements from these laws unless we can bring the agreement within the expressly stated standards, which has not been done except for the majority's effort to interpret "detriment" or "public policy" using a partial statement

in *Isbrandtsen Co., Inc. v. United States et al.*, 211 F. 2d 51 (D.C. Cir. 1951) at p. 57 (*cert. den.*, 347 U.S. 990). The full statement is: "The condition upon which such authority [to approve agreements under section 15 of the Act] is granted is that the agency entrusted with the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." The court equates consistency with an antitrust prohibition (itself difficult to determine) with a "public interest" standard. Such a standard was later put in section 15 in 1961 by Public Law 87-346 (75 Stat. 762). There is no way of telling which antitrust prohibition is to be used to test invasion, nor any way of balancing the prohibition against the purposes of the act.

Scrutinizing the intercarrier obligation alone, it is impossible to say that the record and briefing in this case establishes that this long-established and approved agreement clearly invades the prohibitions of the antitrust laws or to what extent. Absent such a demonstration by the Commission, section 15 compels approval.

The majority's comment establishes as a standard that approval of agreements under section 15 now involves a grant of an antitrust exemption privilege on condition that certain objectives are "furthered." A test, such as furthering "policies and purposes," is not expressly prescribed in section 15 or elsewhere. The agreement provision, as with any other intercarrier agreement, *must be approved unless* the Commission can show it is detrimental to commerce, unjustly discriminatory or unfair as between carriers or ports or contrary to the public interest or otherwise in violation of the Act. Detriment, contrariety, and violation, not furthering, are the tests.

The majority shows no connection between detriments to commerce or contrariety with public interest and the necessity to combat destructive carrier competition or furtherance of "regulatory purposes" or "purposes and policies" of the act. Perhaps the connection is implicit; but even with an implicit connection we need a statement of how to measure stifling of competition and of what the purposes and policies thus set up as measurements consist of, plus a few facts to be measured by the standard tests. The needed tests cannot be determined from this record, much less the facts. One party recognized as much by falling back on illegality under section 14, subparagraph "Third," as interpreted in *Federal Maritime Board v. Isbrandtsen*, 356 U.S. 481 (1958). Section 14 prohibits a carrier from retaliating against shippers by certain methods because of specified reasons. The *Isbrandtsen* interpretation of section 14 establishes as a violation a contract requirement that a shipper not patronize independent on nonconference member carriers when such a contract is demanded in a context of being a "necessary competitive measure to offset the effect of nonconference competition," because in such circumstance the demand becomes a "resort to other discriminating or unfair methods." Such a context of offsetting needs and demands does not exist here. All that has been done is, by some reverse logic of negatives, to argue that the absence of a showing of competitive necessity by the respondent conference carriers proves there is no need for the rule and without such need the rule is illegal, and besides tying agreements are generally illegal. Whatever is relied on, we are again faced with the necessity of supporting the burden of disapproval and of not relying on deficiencies in the respondent's case to support our burden.

For these reasons, I dissent from the majority's disapproval of the conference's tying agreement.

DISSENT NUMBER (3)

The majority has reversed the examiner's conclusion that no ruling should be made on the Commission authority to regulate the levels of compensation paid to travel agents by the carriers. This issue is entirely outside the scope of the issues as defined by our predecessor agency, the Federal Maritime Board, in its order of November 2, 1959: "to determine whether the aforementioned Agreements 120 and 7840 should be disapproved, canceled, or modified, insofar as they relate to travel agents in accordance with section 15 of the Shipping Act, 1916." Neither agreement sets levels of compensation nor requires any disapproval, cancellation, or modification of compensation levels. The agreements only provide a procedure for deciding how much or what percentage of the passage fare the members are willing to allow agents as compensation for the sale of tickets. The issue of levels was first raised in the brief of the travel agents, which stated: "Contrary to sweeping assertions of Conference counsel, the Maritime Commission has both the right and the responsibility to approve or disapprove the commission level established by the collective action of the respondents." It is possible that the level so established might violate the Shipping Act, but such an issue is not before us and the record is totally inadequate for such a serious decision. Here we are asked to pass on the reasonableness of rate levels and the majority says it is unable to make a finding that the present level of commissions is so low as to be detrimental to the commerce of the United States. The most that is provided by the majority, therefore, is a volunteer legal opinion regarding what is thought to

be our authority, but there is no realistic application of the power because no change is made in the existing levels. Absent an application of the power, vouchsafing the opinion is frivolous. Apparently, now that the decision as to our jurisdiction is out of the way, we are free to proceed later to decide on a satisfactory level of commissions set pursuant to conference agreements, in spite of the disclaimer of "jurisdiction to set the specific level of compensation," assuming a difference between these two types of jurisdiction. When this time comes I anticipate the issue will be just as present and unresolved as it is now and will necessitate a decision with more practical issues at stake. Nothing is accomplished by a decision at this time.

The examiner's decision not to pass on the question until more significant issues are at stake should be sustained.

In concurring as to the results in items (4) and (5) of the majority report, I do not necessarily approve the reasoning. The restraints imposed by the conference, whether by unanimity or any other percentage of votes, on the travel agents' freedom to enter business, sell their business, transfer ownership, or change officers or locations, were not justified by any corresponding advantage to the traveling public. I would decide without further proof that such freedom existed and that a restraint thereon by means of "control" committee clearances was against the public interest unless justified as an effective protection for the purchasers of tickets. These restraints can not be justified as reasonably related to the production of business or to an agent's capacity to perform his sales functions for the public. The respondents' carrier members may refuse to enter contracts or terminate contracts with agents they do not trust or consider to be improperly located for the generation of sales, but this is quite

different from requiring prior consent to, or even consultation about, business decisions of travel agencies. The intrusion is against the public interest.

COMMISSIONER DAY, *concurring and dissenting*:

I concur with the results reached in the majority report in this proceeding as set forth under "First" in the preceding opinion of Commissioner John S. Patterson, and for reasons advanced by Commissioner Patterson I am in accord with the remainder of his opinion.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

ORDER

This proceeding having been instituted by the Commission to determine whether Agreement No. 120, Trans-Atlantic Passenger Steamship Conference, and Agreement No. 7840, Atlantic Passenger Steamship Conference, should be disapproved, canceled, or modified pursuant to section 15 of the Shipping Act, 1916, and the Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference, and having found that said agreements in certain respects violate section 15 and must be modified, as set forth in said report:

It is ordered, That the parties to Agreements Nos. 120 and 7840, being the member lines of the Trans-Atlantic Passenger Steamship Conference and the Atlantic Passenger Steamship Conference, respec-

tively, shall within 60 days from the date of this order file with the Commission for its review and approval under section 15 of the act, modifications of said agreements and the rules thereunder consistent with the said report;

It is further ordered, That this proceeding shall be held open pending the Commission's further order following its consideration of the modifications so filed and the comments thereon which will be invited from interested parties.

By the Commission, January 30, 1964.

(Signed) THOMAS LISI,
Secretary.